81

No. _____

Supreme Court, U.S.
FILED
07-968 DEC 17 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MANUEL GOMEZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The First District Court Of Appeal For The State Of Florida

PETITION FOR WRIT OF CERTIORARI

WILLIAM MALLORY KENT
Counsel for Petitioner
Florida Bar No. 0260738
1932 Perry Place
Jacksonville, Florida 32207-3443
904-398-8000 Phone
904-348-3124 Fax
904-662-4419 Cell Phone
kent@williamkent.com Email

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. AS SUGGESTED IN *DICTA* IN *THORNTON v. UNITED STATES*, 541 U.S. 615, 124 S.Ct. 2127 (2004), THE THIRTY-MINUTE DELAY BETWEEN ARREST AND SEARCH, CONDUCTED AFTER THE PASSENGER IN GOMEZ'S CAR WAS ARRESTED, HANDCUFFED AND IN THE BACK OF THE PATROL CAR, TOOK THIS SEARCH OUTSIDE THE SAFE HARBOR OF *NEW YORK v. BELTON,* BECAUSE THE SEARCH WAS NOT DONE CONTEMPORANEOUSLY WITH THE ARREST, AS REQUIRED BY *BELTON*.

II. *COOLIDGE v. NEW HAMPSHIRE*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), PRECLUDES THE SEARCH OF AN AUTOMOBILE RECENTLY OCCUPIED BY AN ARRESTED PERSON WHERE THE EXIGENCY FOR THE SEARCH IS CREATED BY THE STATE.

III. *BELTON* MUST BE HARMONIZED WITH *TERRY v. OHIO* AND ITS PROGENY, WHICH INVALIDATE SUBSEQUENT POLICE CONDUCT TAINTED BY AN ILLEGAL OR ILLEGALLY PROLONGED DETENTION, AND SUCH HARMONIZATION WOULD NOT PERMIT THE CONTINUED ILLEGAL DETENTION OF GOMEZ AND HIS AUTOMOBILE AFTER THE PASSENGER WAS ARRESTED, HANDCUFFED, AND LOCKED IN THE REAR OF THE PATROL VEHICLE AND WOULD RENDER THE DELAYED SEARCH "INCIDENT" TO THE PASSENGER'S ARREST UNREASONABLE FOR PURPOSES OF *BELTON*'S CONTEMPORANEITY REQUIREMENT.

LIST OF PARTIES

All parties appear in the caption of the case on the title page.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINION AND DECISION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF FACTS MATERIAL TO THE ISSUES PRESENTED 3

ARGUMENTS 7

CONCLUSION 22

APPENDIX

Decision of Florida 1st District Court of Appeal ..... App. 1

Florida Supreme Court Decision Denying Review ..... App. 6

TABLE OF AUTHORITIES

Page

CASES

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) 15, 17

Dade County School Board v. Radio Station WQBA, 731 So.2d 638 (Fla. 1999) 18

Jaworski v. State, 804 So.2d 415 (Fla. 4th DCA 2001) 18

New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) ..... *passim*

Robertson v. State, 829 So.2d 901 (Fla. 2002) 18

State v. Pitts, 936 So.2d 1111 (Fla. 2nd DCA 2006) 18

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968) 19, 20, 21

Thornton v. United States, 541 U.S. 615, 124 S.Ct. 2127 (2004) 7

United States v. Abel, 707 F.2d 1013 (9th Cir. 1983), *rev'd on other grounds,* 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) 10

United States v. Cotton, 751 F.2d 1146 (10th Cir. 1985) 10

United States v. McCrady, 774 F.2d 868 (8th Cir. 1985) 10

United States v. Seals, 987 F.2d 1102 (5th Cir. 1993) 14

TABLE OF AUTHORITIES – Continued

Page

United States v. Vasey, 834 F.2d 782 (9th Cir. 1987) 11

United States v. Wells, 347 F.3d 280 (8th Cir. 2004) 13

CONSTITUTION

Fourth Amendment to the United States Constitution ..... *passim*

PETITION FOR A WRIT OF CERTIORARI

The petitioner, MANUEL GOMEZ, respectfully prays that a writ of certiorari issue to review the decision of the Florida First District Court of Appeal entered March 12, 2007 on an appeal by the State of Florida reversing the order of the trial court which had granted a dispositive motion to suppress. Gomez then petitioned the Florida Supreme Court for discretionary review of the decision of the Florida First District Court of Appeal, and his petition was denied September 18, 2007.

OPINION AND DECISION BELOW

The decision of the Florida First District Court of Appeal was reported as *State of Florida v. Manuel Gomez*, 951 So.2d 71 (Fla. 1st DCA 2007), and a copy of that decision is included in the Appendix, *infra*. Review was denied by the Florida Supreme Court in an unreported decision found at *State of Florida v. Manuel Gomez*, 967 So.2d 197 (Fla. 2007), a copy of which is also included in the Appendix, *infra*.

JURISDICTION

Petitioner Manuel Gomez filed a motion to suppress challenging the admission of the drug evidence in a felony possession of controlled substance case filed in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida. The trial level court

granted his motion to suppress. The State of Florida appealed to the Florida First District Court of Appeal the trial court order granting the motion to suppress. The Florida First District Court of Appeal reversed the trial court order granting the motion to suppress. Gomez then sought discretionary review at the Florida Supreme Court, which denied his petition for review on September 18, 2007. This petition followed in a timely manner within ninety days of that decision. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF FACTS MATERIAL TO THE ISSUES PRESENTED

The State of Florida challenged the trial court's decision to grant Gomez's motion to suppress evidence (a duffel bag containing various drugs found in the back of Gomez's car).

The events began on December 1, 2005, when a detective with a Fugitive Apprehension Strike Team, referred to as "FAST," received a tip from a fellow law enforcement officer that a fugitive named Michael Callaway ("Callaway") had fled the city of St. Augustine, Florida and had relocated to Jacksonville, Florida. The officer also informed the FAST detective that St. Augustine officials had an outstanding warrant on Callaway for narcotics activity. The officer informed FAST that Callaway could be located at a particular residence in Jacksonville, Florida. FAST adopted the case and initiated surveillance of the residence.

Senior Deputy United States Marshal Dwayne Johnson ("Marshal Johnson") was one of the first members of FAST to arrive at the residence. Approximately 15 to 30 minutes after Marshal Johnson arrived, Gomez arrived, driving a Chevrolet Impala (the "Impala"), a four-door car. The FAST team did not know who Gomez was.

Gomez exited the Impala and entered the residence that FAST was observing. Approximately 15 to 20 minutes later, Gomez exited the residence along with Callaway – the suspect the FAST team had the

arrest warrant for – and another unidentified man. Gomez got in the driver's seat of the Impala, while Callaway and the unidentified man entered from the passenger side, with Callaway sitting in front and the other man in the back seat.

Driving his undercover police vehicle, Marshal Johnson followed the Impala as it left the residence. The FAST detectives were coordinating a plan to pull over the Impala, but Gomez unexpectedly parked the car outside of a post office. The back-seat passenger of the Impala, who was never identified, exited the car and entered the post office. At that point, while Callaway was still seated in the front passenger seat, Gomez exited the driver's side of the car and "actually started walking back towards [Marshal Johnson's vehicle,] and at that point we didn't know his intentions, so we acted and made the arrest." The FAST detectives emerged from their vehicles and handcuffed both Gomez and Callaway at gunpoint. Marshal Johnson allowed Gomez to lean against the Impala. When asked, Gomez told FAST that the passenger in the Impala was indeed Callaway. Callaway also had identification in his pocket.

Thus, Callaway's identity was confirmed within moments of the initial seizure. Callaway was then arrested and placed in handcuffs in the back of the patrol vehicle which arrived at the scene.

The FAST team continued to detain Gomez in handcuffs, although there was no legal basis to detain him. Marshal Johnson confirmed that there were no

outstanding warrants for Gomez's arrest. The Impala was registered to a person other than Gomez. Gomez informed the officers that the Impala belonged to "a lady friend of his and he was actually doing some detailing work on the vehicle for that lady." Marshal Johnson later verified this claim while he continued to detain Gomez.

After Callaway's identity was confirmed and the authorities determined that there were no outstanding warrants for Gomez's arrest, Marshal Johnson searched the passenger compartment of the Impala. Marshal Johnson had no warrant to search the vehicle and he did not seek anyone's consent before searching the passenger compartment of the vehicle. He testified that he did so because it was standard FAST procedure to search a vehicle following the arrest of any of its occupants.

But the search of Gomez's vehicle took place approximately thirty minutes after Callaway had been arrested, handcuffed, and placed in the rear of the police vehicle, although the officers had accomplished their purpose in identifying and arresting Callaway within a minute or two of the confrontation. During this entire time Gomez was handcuffed and illegally detained. The officers conducted the search while Callaway was handcuffed in the rear of the police vehicle. They exhibited no fear nor testified to any fear that Callaway would try to get out of the police vehicle to grab a weapon or evidence. In fact,

the officer justified the search as "standard operating procedure."[1]

Behind the driver's seat, Marshal Johnson found a small duffel bag or gym bag on the floorboard. Marshal Johnson did not have a warrant or consent to open the bag. Marshal Johnson unzipped the bag and smelled marijuana. Inside the bag was a "substantial amount of marijuana," a quantity of cocaine, a scale, and a t-shirt.

At this point, Gomez was arrested for drug possession. On December 16, 2005, the State of Florida charged Gomez with one count of possession of cocaine and one count of possession of more than 20 grams of cannabis. On March 10, 2006, Gomez filed a Motion to Suppress the fruits of the search of the Impala. On March 28, 2006, the trial court held a hearing on Gomez's motion. At the hearing, the trial court heard testimony from Marshal Johnson. No other evidence or testimony was presented to the trial court. At the conclusion of the evidence, the State Attorney argued that the Motion to Suppress should be denied because the search of the car was justified as incident to the arrest of Mr. Callaway. Gomez argued that once the purpose of the stop (the identification and arrest of Callaway) was effectuated, there

---

[1] Also, FAST'S original information from the law enforcement officer in St. Augustine suggested that Mr. Callaway had done some of his drug dealing with a pistol, "and so after we arrested him we were looking for any pistol or anything he could have slid under the seat or had in the vehicle."

was no reason to detain him or search the Impala. Gomez cited several cases for the proposition that, where a defendant is detained even after the police have completed the purpose for which they initially stopped the vehicle, the fruits of any subsequent search of the person's vehicle should be suppressed. Gomez argued that once the members of the FAST team got Michael Callaway and ascertained his ID, that's where it should have ended.

The trial court entered an order granting Gomez's Motion to Suppress. The State appealed and prevailed on appeal and this petition followed in a timely manner.

ARGUMENTS

I. AS SUGGESTED IN *DICTA* IN *THORNTON v. UNITED STATES*, 541 U.S. 615, 124 S.Ct. 2127 (2004), THE THIRTY-MINUTE DELAY BETWEEN ARREST AND SEARCH, CONDUCTED AFTER THE PASSENGER IN GOMEZ'S CAR WAS ARRESTED, HANDCUFFED AND IN THE BACK OF THE PATROL CAR, TOOK THIS SEARCH OUTSIDE THE SAFE HARBOR OF *NEW YORK v. BELTON*, BECAUSE THE SEARCH WAS NOT DONE CONTEMPORANEOUSLY WITH THE ARREST, AS REQUIRED BY *BELTON*.

The State court of appeals rested its decision on *New York v. Belton*, which held:

> [W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, *as a contemporaneous incident of that arrest*, search the passenger compartment of that automobile [and] may also examine the contents of any containers found within the passenger compartment . . .

New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981) (emphasis supplied).[2]

---

[2] The continuing vitality of *Belton* has been placed in doubt by *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127 (2004). In *Thornton*, Justice Scalia wrote, in dissent:

> When petitioner's car was searched in this case, he was neither in, nor anywhere near, the passenger compartment of his vehicle. Rather, he was handcuffed and secured in the back of the officer's squad car. The risk that he would nevertheless "grab a weapon or evidentiary ite[m]" from his car was remote in the extreme. The Court's effort to apply our current doctrine to this search stretches it beyond its breaking point, and for that reason I cannot join the Court's opinion.

Thornton, 541 U.S. at 2133, 124 S.Ct. at 625.

Although *five justices agreed with this proposition*, it was not adopted as the holding in the case only because Justice O'Connor, while agreeing with the proposition, declined to adopt it solely on the jurisprudential ground that certiorari had not been granted on that question. Justice O'Connor wrote:

> I write separately to express my dissatisfaction with the state of the law in this area. As Justice SCALIA forcefully argues, *post*, pp. 2133-36 (opinion concurring in judgment), lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement

(Continued on following page)

What the State decision completely neglected to analyze is that the search in Gomez's case was not a *contemporaneous* incident of Callaway's arrest as required by *Belton*.[3] The search in Gomez's case falls outside the *Belton* safe harbor, because it was not conducted contemporaneously with the arrest, but instead only conducted many minutes after Callaway was arrested, handcuffed, and secured in the back of a waiting patrol car.

In *Belton*, the Supreme Court was mindful of the fact that officers should not be forced to make difficult legal decisions in the split-seconds during the often-volatile circumstances of an arrest. It was upon this consideration that several courts have held that a search of an automobile may be conducted as a search

---

rather than as an exception justified by the twin rationales of *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). That erosion is a direct consequence of *Belton's* shaky foundation. While the approach Justice SCALIA proposes appears to be built on firmer ground, I am reluctant to adopt it in the context of a case in which neither the Government nor the petitioner has had a chance to speak to its merit." *Thornton*, 124 S.Ct. at pp. 624-625.

Gomez agrees with Justice Scalia in this instance, and argues that to the extent *Belton* has been held to permit a search contemporaneously incident to arrest after the suspect is handcuffed and in the back of the patrol car, it was wrongly decided or wrongly applied, and on that ground alone, the State's reliance on *Belton* should not be accepted.

[3] In the argument presented as Issue II below, we argue that the search was also not *incident* to the arrest.

incident to arrest even when the arrestee has been taken from a vehicle and handcuffed. *United States v. McCrady,* 774 F.2d 868, 871-872 (8th Cir. 1985); *United States v. Cotton,* 751 F.2d 1146, 1149 (10th Cir. 1985); *United States v. Abel,* 707 F.2d 1013, 1015, n. 3 (9th Cir. 1983), *rev'd on other grounds,* 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984).

Belton and its progeny are distinguishable, however, because the searches followed closely on the heels of the arrest.

But the search of Gomez's vehicle in this appeal took place as long as thirty minutes after Callaway had been arrested, handcuffed, and placed in the rear of the police vehicle, and although the officers had accomplished their purpose in identifying and arresting Callaway within a minute or two of the confrontation. During this entire time Gomez was handcuffed and illegally detained.[4]

During the possible thirty minutes that elapsed between the arrest and the warrantless search, the *Belton* Court's fear of forcing officers to make split-second legal decisions during the course of an arrest evaporated and took with it the right of the officers to enter the vehicle under the guise of a search incident

---

[4] The officers conducted the search while Callaway was handcuffed in the rear of the police vehicle. They exhibited no fear nor testified to any fear that Callaway would try to get out of the police vehicle to grab a weapon or evidence. In fact, the officer justified the search as "standard operating procedure."

to arrest. At some point once the suspect, Callaway, was handcuffed and secured in the back of the police vehicle the right to search the car under *Belton* ceased.

Simply because the officers had the right to enter the vehicle during or immediately after the arrest, a continuing right was not established to enter the vehicle without a warrant. This search, on these facts, simply was not contemporaneous with Callaway's arrest as is required by the express terms of *Belton*.

The circumstances of each arrest dictate whether the search was proper and conducted contemporaneously with the arrest or not and in this case; in this case the circumstances establish that the it was beyond what *Belton* contemplated.[5]

The federal courts have agreed that delay in conducting a search incident to an arrest can take the search outside the safe harbor of *Belton*. A case with remarkably similar facts to Gomez is *United States v. Vasey*, 834 F.2d 782, 787-788 (9th Cir. 1987). In *Vasey*

---

[5] In its initial appeal brief, the State questioned the half hour figure argued by Gomez below as being the time between satisfying the purpose of the stop and the search. This objection was not made to the trial court below, and the State itself at n. 4, p. 20 of its brief waives any objection to the argument that the delay in conducting the search could take the search outside *Belton*, instead taking the position that the "bright line" of *Belton* is of infinite duration.

the delay between the arrest and search of the automobile incident to the arrest was 30-45 minutes after the suspect had been arrested. The Ninth Circuit held that the 30-45 minute delay in *Vasey* exceeded the *Belton* court's explicit directive that a search incident to arrest must be *contemporaneous* with the arrest, not following the arrest at a point when the need for split-second decision making no longer pertained. The Court explained:

> The *Belton* Court did not completely abandon Fourth Amendment privacy rights at the expense of establishing a bright line test for law enforcement personnel. This is shown by the Court's adherence to the narrow scope of the search incident to arrest exception espoused in *Chimel* and by the Court's explicit directive that a search be conducted contemporaneously with the arrest. The *Belton* holding does have limits and those limits were exceeded here. The warrantless search in this case violated the *Chimel* principle and was not conducted contemporaneously with the arrest. . . . The search also falls outside the *Belton* prophylactic rule because it was not conducted contemporaneously with the arrest. . . . The *Belton* Court explicitly admonished that the search had to be conducted contemporaneously with the arrest. The government, in effect, asks us to transform the search incident to arrest exception into a search *following* arrest exception. This we decline to do.

The Eighth Circuit reached a similar conclusion in *United States v. Wells*, 347 F.3d 280 (8th Cir. 2004):

> The Grand Am was stopped; Wells was arrested. Once he was arrested, law enforcement was authorized to conduct a search incident to the arrest. *New York v. Belton,* 453 U.S. 454, 460, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) (holding "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile"). *Such a search, however, must be contemporaneous to the arrest. The government's brief raises doubt about whether the search was contemporaneous*, for it quotes the arresting officer as saying:
>
> I went to the passenger door, opened the door from the outside. I asked Mr. Wells to step out. I believe I took control of one of his arms on the way out and handcuffed him. I drove the blue Pontiac four door that Mr. Wells was in to the northeast precinct to do an inventory search and to impound the vehicle. . . . It was going to be impounded and it's the standard procedure to search. Also, Mr. Wells was under arrest at the time for marijuana that was found on his person. Subsequent to his arrest the vehicle was searched. . . .
>
> *Because these facts can be read to imply the search did not follow hard upon the heels of*

> *the arrest, we are unwilling to sanction the search as one incident to a lawful arrest.*

[emphasis supplied]

The Fifth Circuit suggested a similar result, in *dicta*, in *United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir. 1993):

> The magistrate stated that the original "sniff" conducted by the K-9 unit was permissible under the search incident to an arrest exception to the warrant cause. We express certain misgivings as to whether the "sniff" could be considered a search incident to an arrest in light of the fact that the defendant had already been arrested, handcuffed, and removed from the scene at least thirty minutes before the search took place.

The *Belton* Court explicitly admonished that the search had to be conducted *contemporaneously* with the arrest. The Florida Court of Appeal in effect transformed the search incident to arrest exception found in *Belton* into a search *following* arrest exception. This cannot be done consistent with *Belton* and the Fourth Amendment.

II. *COOLIDGE v. NEW HAMPSHIRE*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), PRECLUDES THE SEARCH OF AN AUTOMOBILE RECENTLY OCCUPIED BY AN ARRESTED PERSON WHERE THE EXIGENCY FOR THE SEARCH IS CREATED BY THE STATE.

Testimony from the State's own witness, Senior Deputy United States Marshal Dwayne Johnson, who was a member of a fugitive apprehension strike team, established that there was an outstanding arrest warrant for Michael Callaway. A member of the fugitive apprehension strike team received a tip that Callaway could be found at a residence in Jacksonville, Florida. The team set up surveillance on the residence. The team knew Callaway was in the residence – apparently they saw him go inside while it was under surveillance. Callaway was later observed coming out of the residence, which was surrounded by the fugitive apprehension strike team.

The fugitive apprehension team elected to not execute the arrest warrant as Callaway entered the residence, while he was at the residence, or when Callaway exited the residence.

Instead, the officers waited and allowed Callaway to get into Gomez's car and then after Callaway got into the car driven by Gomez, the team began to tail Gomez's car and waited to arrest Callaway until the car stopped at a post office some distance away. The fact that Callaway was in the car when the

arrest was made was then used as the pretext to search Gomez's car.[6]

Callaway could have been arrested at his residence or outside his residence, but instead, the fugitive apprehension team elected to allow him to get into an automobile, followed him in that automobile after he left the residence, and made an arrest on a public street while he was in the automobile.

In other words, the police created the necessity of searching the car by delaying the arrest until Callaway was in the car, which they thought then authorized them to search the car without obtaining a search warrant – a search warrant they could not have obtained because they did not have probable cause to search the car in the first place.

---

[6] We say pretext as a matter of objective fact, not necessarily the subjective intent of the officers. The record on the officers subjective thoughts was not developed. However, given the amount of time between Callaway entering the residence, the arrival of Gomez, the time Gomez was in the residence with Callaway before Callaway and Gomez exited the residence and then got in Gomez's car, it is apparent there was plenty of time for a trained fugitive apprehension team to analyze the situation, discuss alternatives, and make a reasoned decision whether to execute the warrant at the scene or to wait and make the arrest if and when Callaway got into the car. The decision clearly was made to wait until Callaway got into the car. This was not an unforeseen, sudden development but something that was easily anticipated and whether anticipated or not, which developed over sufficient period of time that a consultative decision could be made whether to use the situation to make an arrest outside or inside the car conscious of the consequences of each alternative.

On these facts, the operative case was *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), not *New York v. Belton. Coolidge* precludes the search of an automobile recently occupied by an arrested person where the exigency (substitute for a search warrant) is created by the state.

In the instant case, the arresting officers planned Callaway's arrest. Deputy Marshal Johnson testified he intended in advance to arrest Callaway and had a warrant to do so – but he did not have probable cause to search Callaway's or Gomez's car, therefore he had not applied for a search warrant to do so.

Belton is readily distinguishable. *Belton* involved the unplanned, unanticipated arrest of an occupant, or recent occupant, of a motor vehicle – thereby confronting the arresting officer with an exigent circumstance *which he had not created.*

That is not the case here. Here, the arresting officers created the exigency by not arresting Callaway before he entered the automobile.

Coolidge is directly on point and supported the trial court's order of suppression. As a plurality of the Court stated in *Coolidge*: "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." 403 U.S. at 461-62, 91 S.Ct. at 2035. The lower court was correct in granting the motion to suppress, because on the facts of Gomez's case, the arresting officers created the exigency that was used to justify the warrantless search of

Gomez's automobile. That is not permitted under the Fourth Amendment.[7]

Belton requires that a search be *contemporaneous* and *incident* to the arrest. The search in Gomez's case was neither.

---

[7] Even if the trial court's apparent reasoning in suppressing the evidence was erroneous or that Gomez did not specifically articulate the above basis for proper affirmance of the ruling on the motion to suppress, under Florida's "Tipsy Coachman" doctrine, the trial court's suppression must be affirmed if the record before the court of appeals establishes a proper basis for the trial court's ruling, *see Robertson v. State*, 829 So.2d 901, 906-07 (Fla. 2002); *Dade County School Board v. Radio Station WQBA*, 731 So.2d 638, 644-45 (Fla. 1999), and *Jaworski v. State*, 804 So.2d 415, 419 (Fla. 4th DCA 2001), cited in *State v. Pitts*, 936 So.2d 1111, 1133 (Fla. 2nd DCA 2006). The record in this case was adequate to support the trial court's ruling.

III. *BELTON* MUST BE HARMONIZED WITH *TERRY v. OHIO* AND ITS PROGENY, WHICH INVALIDATE SUBSEQUENT POLICE CONDUCT TAINTED BY AN ILLEGAL OR ILLEGALLY PROLONGED DETENTION, AND SUCH HARMONIZATION WOULD NOT PERMIT THE CONTINUED ILLEGAL DETENTION OF GOMEZ AND HIS AUTOMOBILE AFTER THE PASSENGER WAS ARRESTED, HANDCUFFED, AND LOCKED IN THE REAR OF THE PATROL VEHICLE AND WOULD RENDER THE DELAYED SEARCH "INCIDENT" TO THE PASSENGER'S ARREST UNREASONABLE FOR PURPOSES OF *BELTON*'S CONTEMPORANEITY REQUIREMENT.

It is certainly implicit in *Belton* that an innocent driver may be made to wait while his automobile is searched if a passenger in his automobile has been lawfully arrested. But it is equally true under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), that an investigatory detention can continue no longer than necessarily required to dispel the suspicion. Although the *Terry* progeny cases cited by Gomez to the Florida trial court did not directly control the outcome of his motion, because their holdings were directed toward excluding the fruit of the illegal detention in each case, neither can their holdings nor the Constitutional requirement that undergird them be ignored.

Rather, the *Terry* progeny should be harmonized with *Belton*, and we suggest that that harmonization is already implicit in *Belton's* limitation that the

search incident to a *Belton* arrest must be *contemporaneous* with the arrest. That is, as read under the gloss of *Terry*, the arresting officer must proceed immediately and directly to search the innocent driver's automobile, and allow the innocent driver to proceed on his way as soon as that search has been completed. To unnecessarily prolong or delay the search is to go beyond the limited exception to the Fourth Amendment permitted by *Belton* whose contemporaneity requirement honors the right of the innocent driver to go about his business as soon as is reasonably possible.

Alternatively, to delay the search, or to wrongfully detain the innocent driver, as was done in this case, is not only to violate the express contemporaneity requirement of *Belton*, but to violate as well the driver's independent Fourth Amendment right to be free of unreasonable seizure of his person or effects (his car). We submit that any search which unnecessarily intrudes on the innocent driver's independent Fourth Amendment right to be free to go about his own business – by unlawfully detaining him – or which unnecessarily delays his ability to go about his business, by unnecessarily delaying the search of his vehicle, by definition is an *unreasonable* search for Fourth Amendment purposes and must be held to be outside the safe harbor of *Belton*.

Gomez's proposed harmonization of *Terry* with *Belton* is simply a more complete articulation of what counsel for Gomez and the lower court perhaps unconsciously contemplated in the arguments and

ruling below. *Belton* was meant to provide law enforcement with a bright line rule for authority to search automobiles incident to an arrest. It adds no burden to the officer to execute that authority consistent with *Terry* requirements, at least when an innocent third party is involved. Every experienced law enforcement officer already understands the requirement that *Terry* encounters not be unnecessarily prolonged. *Terry* and *Belton* can be easily harmonized in the field by officers operating under field conditions. The Fourth Amendment requires that harmonization.

Because Gomez was illegally detained and his illegal detention unnecessarily prolonged due to the delay in executing what may have otherwise been an appropriate *Belton* search, the lower court was correct in granting the motion to suppress on the authority of the *Terry* cases cited by counsel for Gomez, because that ruling implicitly harmonized the holding in *Belton,* which itself contains an express contemporaneity requirement, with the holding in *Terry*, that a person may be temporarily detained to dispel reasonable, articulable suspicion, but no longer.

CONCLUSION

Based on the foregoing, Petitioner Manuel Gomez respectfully requests this Honorable Court grant his petition for a writ of certiorari to the First District Court of Appeal for the State of Florida.

Respectfully submitted,

THE LAW OFFICE OF
WILLIAM MALLORY KENT

WILLIAM MALLORY KENT
Florida Bar No. 0260738
1932 Perry Place
Jacksonville, Florida 32207-3443
904-398-8000 Phone
904-348-3124 Fax
904-662-4419 Cell Phone
kent@williamkent.com Email

951 So.2d 71

District Court of Appeal of Florida, First District.

STATE of Florida, Appellant,

v.

Manuel GOMEZ, Appellee.

No. 1D06-3043.

March 12, 2007.

Bill McCollum, Attorney General, and Terry P. Roberts, Assistant Attorney General, Office of the Attorney General, Tallahassee, for Appellant.

William Mallory Kent, Jacksonville, for Appellee.

PER CURIAM.

The State appeals from the circuit court's order granting appellee's motion to suppress evidence seized on December 1, 2005, during the search of a vehicle driven by appellee. The State argues that the search of the vehicle's passenger compartment was legal because it was incident to the lawful arrest of a passenger of the vehicle. We agree and reverse.

Only one witness testified at the suppression hearing in this case. Deputy United States Marshal Dwayne Johnson testified that he is a member of the Fugitive Apprehension Strike Team, or "FAST," a multi-agency task force charged with apprehending fugitives within 12 Florida counties. FAST had received a tip that a fugitive named Michael Callaway had fled the city of St. Augustine and relocated to a residence in Jacksonville, Florida. St. Augustine

officials had an outstanding warrant for Callaway's arrest.

Deputy Johnson was one of the first members of FAST to arrive at the residence for surveillance. After approximately 15 to 30 minutes, appellee arrived at the residence driving a Chevy Impala. Appellee entered the residence under surveillance. After about 15 to 20 minutes, appellee, Callaway, and another unidentified man exited the residence and got into the vehicle, with appellee driving and Callaway as the front-seat passenger.

Deputy Johnson and other members of FAST followed the Impala. However, before the Impala could be pulled over, appellee unexpectedly parked the car, and the unidentified passenger exited the vehicle and entered a post office. Callaway was still seated in the front passenger seat. Appellee then exited the driver's side of the car and started walking back towards Deputy Johnson's vehicle. Members of FAST, not knowing appellee's intentions, emerged from their vehicles and handcuffed both appellee and Callaway. Appellee was set, in handcuffs, against the Impala.

Callaway was arrested after his identity was confirmed by both appellee and identification found in Callaway's pocket. Deputy Johnson confirmed there were no outstanding warrants for appellee. It was discovered that the Impala was not registered to appellee, however, Johnson made some checks and

verified appellee's story that he was in possession of the vehicle to perform detailing work for a friend.

Deputy Johnson performed a search of the passenger compartment of the vehicle, and discovered a small duffel bag on the floor board behind the driver's seat. Johnson opened the bag which contained marijuana, cocaine, a scale, and a t-shirt which was the same color, size, and had the same advertising on it as the one appellee was wearing. Appellee was then arrested for drug possession. It is undisputed that Johnson did not have a warrant or consent to search either the vehicle or the bag.

The State argues that *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), is controlling. *Belton* held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460, 101 S.Ct. 2860. Additionally, "the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." *Id.* This is a bright-line rule which does not depend on reasonable suspicion of criminal activity or probable cause. *State v. Gilbert,* 894 So.2d 1055, 1056-57 (Fla. 1st DCA 2005). "This rule is based on the need to remove any weapons and to preserve any evidence that might be in the vehicle." *Id.* at 1057. The authority to conduct a search does not depend on a trial court's subsequent determination

that weapons or evidence will likely be found in the car. "As long as the arrest itself is lawful, no additional justification is required for a search incident to the arrest." *Id.*

In this case, it is undisputed that Callaway was a passenger in appellee's vehicle immediately before his arrest, and that Callaway was legally arrested pursuant to a warrant. Accordingly, it was legal to undertake a search of the passenger compartment of the vehicle and any containers therein pursuant to *Belton*. *See State v. Smith,* 662 So.2d 725 (Fla. 2d DCA 1995) (ruling that where the police had a warrant to arrest the passenger, the subsequent search of the vehicle, driven by the appellee, and the search of appellee's black bag, left behind in the vehicle, were legal).

Because the lawful arrest of only one occupant will support a *Belton* search, the search of the vehicle's passenger compartment is not rendered invalid where law enforcement had no reason to arrest or detain appellee, the vehicle's driver, at the time of the search. *See Shaw v. State,* 449 So.2d 976, 979 (Fla. 1st DCA 1984) (noting, "there is even greater justification for a *protective* search where the officers, at the time of the search, know that the arrestee's companions, with respect to whom no grounds then exist for arrest or further detention, will probably be allowed reentry into the passenger compartment of the vehicle with resultant access to any weapons which might be present").

The search of the vehicle's passenger compartment and the duffel bag were legal pursuant to the bright-line rule established in *Belton*. Therefore, we reverse the trial court's order, and remand for further proceedings.

REVERSED and REMANDED.

BARFIELD, BENTON, and POLSTON, JJ., concur.

---

967 So.2d 197

Supreme Court of Florida.
Manuel Gomez
v.
State
NO. SC07-658

September 18, 2007

Appeal From: 1st DCA, 951 So.2d 71

Disposition: Rev.den.